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No. 83-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC., NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT AMERICAN TRUCKING ASSOCIATIONS, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Act, 49 U.S.C. § 10101 *et. seq.*, prohibits the publication of motor carrier of property transportation tariffs containing provisions under which the liability of the carrier for the property it transports is limited to a value established by written declaration of the shipper or by written agreement between the carrier and shipper where the value of the property and the carrier's liability is determined by means of a deductible.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
ARGUMENT	2
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
Greyhound Corp. v. *Mt. Hood Stages Inc.*, 437 U.S. 322 (1978)	3
Hart v. *Pennsylvania Railroad*, 112 U.S. 331 (1884)	7
Joray Trucking Corp., Common Carrier Application, 99 M.C.C. 109 (1965)	4
Loss and Damage Claims, 340 I.C.C. 515 (1973)	10
Docket No. 38752, *Petition for Declaratory Order on Deductibles in Household Goods Released Rates* (unprinted), served March 23, 1982	1, 2
Released Rate Decision No. FF-303, *Interstate International, Inc., Used Household Goods*, (unprinted), served May 20, 1980; *affirmed* Div. 1 (unprinted), served August 18, 1980; *affirmed* Comm. (unprinted), served October 3, 1980	2, 4
Shippers National Freight Claim Council v. *I.C.C.*, 712 F.2d 740 (2d Cir. 1983)	*passim*
Statutory Provisions:	
28 U.S.C. § 1254(1)	2
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)	*passim*
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980)	5, 6
49 U.S.C. § 20(11)	3
Interstate Commerce Act, 49 U.S.C. § 10101 et seq.	4, 8
49 U.S.C. § 10730	*passim*
Miscellaneous:	
H.R. Rep. No. 1069, 96th Cong., 2d (June 3, 1980)	6, 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at *Shippers National Freight Claim Council* v. *ICC*, 712 F.2d 740 (2d Cir. 1983), rehearing denied December 12, 1983. The decisions of the Interstate Commerce Commission are Docket No. 38752, *Petition for Declaratory Order on Deductibles in Household Goods*

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[1] "Pet. App. ——" refers to the appendices to the petition in No. 83-1496.

Released Rates (unprinted), served March 23, 1982 (Pet. App. E), and Released Rate Decision No. FF-303, *Interstate International, Inc., Used Household Goods* (unprinted), served May 20, 1980 (Pet. App. B), *affirmed* by Appellate Division 1 (unprinted), served August 18, 1980 (Pet. App. C); *affirmed* by the full Commission (unprinted), served October 3, 1980 (Pet. App. D).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. Petitioners request for rehearing was denied by order entered December 12, 1983. The petition for a writ of certiorari was filed March 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

The court of appeals correctly held that a motor carrier may limit its liability for loss or damage to property it transports by establishment of a rate setting a deductible amount in accordance with the provisions of section 10730 of Title 49 of the United States Code, 49 U.S.C. 10730.[2] The decision below does not conflict with federal statute or the common law and is in accordance with the intent of Congress. Further, there is ample opportunity to protest the reasonableness, which appears to be the actual concern of petitioners, of individually established rates setting a deductible, both at the Interstate Commerce Commission and before the federal courts. Therefore, review by this Court is unwarranted.

1. Section 10730 does not prohibit the use of deductibles by motor carriers of property. The Commission's construction of section 10730 complies with the applicable rules of statutory construction and was properly adopted by the court of appeals. In every case of statutory construction the starting point is the language

[2] Section 10730 is set out in full in Pet. App. G.

of the statute itself. *Greyhound Corp.* v. *Mt. Hood Stages Inc.*, 437 U.S. 322, 330 (1978). The statute provides that a carrier may:

> establish rates for the transportation of property . . . under which the liability of the carriers for such property is limited to *a value* established by written declaration of the shipper or by written agreement between the carrier and shipper if *that value* would be reasonable under the circumstances. 49 U.S.C. 10730(b)(1) (Emphasis added).[3]

The statute does not speak of a "maximum value" as petitioners contend (Pet. at 13 & 15),[4] but rather of "a value." The only limitations placed by the statute on how the value is set are that the value be: a) "established by written declaration of the shipper or by written agreement by the shipper and carrier," and b) "reasonable under the circumstances." The court was correct in finding that the use of a deductible method for determining value of goods shipped is as permissible under the statute as is the use of the traditional dollar per unit of weight method supported by petitioners.

The language of former section 20(11) of Title 49, U.S.C., the predecessor to current section 10730, also spoke of "agreement as to *value*" and rates "dependent upon the *value* declared," (Pet. App. G), with no reference or limitation to a maximum value or the method to be used by the carrier and shipper in determining the released value.

The lower court was entirely correct in determining that the only difference between a traditional released

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[3] Section 10730(a), which applies to carriers of used household goods, is identical to 10730(b)(1), which applies to general property carriers, except that rates promulgated under 10730(a) require prior ICC approval and 10730(b) rates are subject to challenge subsequent to their publication.

[4] "Pet. ——" refers to the petition in No. 83-1496.

value and a deductible released value is that the former is set by determining a ceiling to the carriers liability, and the latter is set by determining a floor figure to the shipper's recovery. *SNFCC* v. *ICC*, *supra* at 746.

Petitioners' assertions that a deductible is not a released rate and that a deductible has no relationship to the value of the goods were correctly rejected by the court of appeals.[5] Contrary to petitioners' contentions, a deductible does set an agreed upon value of the goods shipped. All property moving subject to the provisions of the Interstate Commerce Act must have an intrinsic value. *See Joray Trucking Corp., Common Carrier Application*, 99 M.C.C. 109 (1965), and cases cited therein. The released value of goods transported subject to a deductible is simply the actual value of the goods less the amount of the deductible.[6]

Further, petitioners' contention that deductibles were impermissible at both common law and under the Interstate Commerce Act is weakened by the fact that there appears to be no instance in which the Commission or any court has ever so ruled. Petitioners assert that this lack of precedent is because deductibles were so patently impermissible that no carrier ever attempted to use one before. Once again, this assertion lacks any factual support and was rejected by the court of appeals. Respondents believe it is more likely no carrier ever attempted to utilize one before because of the staunchly conservative nature of the Commission on such matters prior to 1980. The simple fact is, however, that prior to the decisions in *Interstate*, *supra*, and *SNFCC* v. *ICC*, *supra*, there

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[5] The term "value" is not defined by the statute.

[6] A shipper's recovery for loss and damage on goods transported subject to a deductible may be more than on those goods transported on a traditional released rate depending on the facts and circumstances surrounding the claim.

was no previous law on the subject.[7] Going beyond the plain meaning of the statute, the legislative history of the Motor Carrier Act, Pub. L. No. 96-296, 94 Stat. 793 (1980) (hereafter "1980 MCA") also supports the Commission's and the Court's construction.

2. The legislative history of the 1980 MCA establishes that Congress intended to allow carriers to offer a variety of price and liability options by shippers. Petitioners' discussion of the legislative history of all the 1980 legislation is deceptively selective. Absent from petitioners' argument is any discussion of the legislative history of section 12 of the MCA and the appropriate provisions of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (hereafter "Staggers Act"). This omission is most notable as the court of appeals devoted several pages to the discussion of the 1980 legislation. *SNFCC* v. *ICC*, *supra* 747-751. Thus, petitioners have disregarded the most pertinent portions of the legislative history of section 10730 and would have this Court do the same.

In discussing the 1980 MCA revisions to section 10730 Congress described the thrust of section 12 as follows:

> Permitting released value rates increases the range of choices available to the shipping public. With a full value rate, a shipper pays one price for two distinct services which are tied together, the actual linehaul of a commodity from one point to another and full insurance on the commodity on that movement. Released rates, in effect, allow the shipper to pay a lesser price for hauling the goods and a separate agree-upon price for whatever amount of

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[7] For this same reason, it was not "incumbent on the Commission to explain . . . why it thought [deductibles] desirable." Pet. at 25. The ICC was not reversing or revising established policy, but rather was considering the *per se* lawfulness of deductibles for the first time. The agency had before it a question of statutory construction, not one of policy.

> insurance the shipper desires. Consequently, if the commodities are of low value or if the shipper wants to take the risk, the shipper may want only partial insurance or *none at all.* Having this option should reduce the total price the shipper must pay for the transportation.

H.R. Rep. No. 1069, 96th Cong., 2d Sess. at 25-26 (emphasis added), reprinted in 1980 U.S. Code Cong. & Ad. News at 2307-08; *SNFCC* v. *ICC*, *supra* at 749-750.

As stated by the court of appeals:

> Thus, while the crux of petitioners' complaint is that the practical effect of a deductible for property of low value is to deprive the shipper of any recovery, this appears to be precisely one of the options Congress sought in the Motor Carrier Act, to have available.

Id.

The court's discussion of the Staggers Act establishes that Congress did not believe it was widening a carrier's ability to limit its liability, but was merely setting guidelines instructing the Commission to allow rail carriers to adopt deductibles. See *SNFCC* v. *ICC*, *supra* at 750-751.

3. Petitioners insist that the only limitations on carrier liability permitted at common law were maximum value released rates and that deductibles were *per se* prohibited. Petitioners fail, again, to cite any judicial decision to substantiate their claim. They would also have the Court reject the court of appeals' analysis of a carrier's common law liability. *SNFCC* v. *ICC*, *supra* at 745-747. Petitioners ignore the fact that the approval of limitations on carrier liability were based on the principle of estoppel. The shipper, who received the benefit of a lower rate received in exchange for a limitation on the carrier's liability, was estopped from subsequently claiming recovery beyond the agreed upon value, providing that the value was reasonable under the circum-

stances. Thus, the common law criteria was almost identical to the provisions of section 10730.

As this Court found in *Hart* v. *Pennsylvania Railroad*, 112 U.S. 331, 342 (1884), "the proper test to be applied to every limitation of the common-law liability of a carrier [is] its just and reasonable character." *See SNFCC* v. *ICC*, *supra* at 745-747. Even if a shipper should agree to a deductible that was greater than the actual value of the goods transported, the limitation on liability may have been enforceable at common law if the shipper received a compensatory reduction in freight rates and full liability protection was available at a higher transportation rate. *Id.* Thus, whether a deductible was legal at common law would be determined on the basis of reasonableness, just as it would under the Commission's construction of the statute.

A deductible is not an exoneration from total liability unless the amount of the loss or damage suffered by the shipper is less than the deductible. However, if the amount of the loss or damage suffered by the shipper is greater than the deductible amount then there is little difference between the effect of a deductible and that of a traditional released rate.

4. Petitioners' principal objections and concerns with regard to the use of deductibles by motor carriers go not to the issue of whether deductibles are allowed under existing law, but rather to the reasonableness of a deductible under a particular set of circumstances (Pet. at 21-26). The reasonableness of a deductible must be determined on the facts and circumstances surrounding the individual tariff containing the provision in question. It should not be determined on the basis of a vast array of hypothetical situations as petitioners have requested this Court do herein. Pet. at 24-25.[8] What was at issue before

[8] Petitioners' selection of United Parcel Service (UPS) as an example carrier was an especially poor choice. UPS carries sev-

the Commission and the court of appeals was whether deductible clauses, as such, were lawful under the Interstate Commerce Act.

Petitioners' concerns over the reasonableness of deductibles and whether they are in the public interest was addressed by Congress. The statute, 49 U.S.C. § 10730, specifically provides that any liability limitation adopted by a carrier: 1) must be based on a value established or agreed upon by the shipper; 2) must be reasonable under the circumstances surrounding the transportation; 3) depending on whether subsection 10730(a) (household goods) or 10730(b) (general commodities) applies, must be approved by the Commission prior to its adoption or subject to Commission review thereafter and; 4) must be set by independent action as the provisions of the 1980 MCA prohibits carriers from jointly adopting new rates under section 10730 or revising any such existing rates after January 1, 1984.

Considering the procedures that carriers must go through to adopt a deductible rate, the administrative and judicial review process available to shippers if they believe a rate is unreasonable "under the circumstances surrounding the transportation," and the increased competitive environment of the post-1980 motor carrier industry,[9] it is highly unlikely, if not totally improbable, that petitioners' "doomsday" predictions about the elimination of carrier liability could come true.

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eral million packages each year. These packages are not as petitioners assert, packed by UPS employees, pet. at 24, but by the shippers. Neither UPS nor its employees would have any way of knowing the contents or value of any one of these millions of packages. Further, the court found the issue of deductibles on small shipments, *SNFCC* v. *ICC*, *supra*. 747 N.5, to be an issue of reasonableness, not lawfulness.

[9] There has been an increase of over 10,000 new carriers since 1980 and most of the then existing 17,000 carriers have greatly expanded their operations under the liberal entry policies of the 1980 MCA.

Petitioners also offer the argument that, if carriers are allowed to use deductibles, there will be an increase in theft and a decrease in care with respect to the property transported. The argument is based on the implausible theory that carriers and carrier employees, knowing that the carrier is not liable on claims for loss and damage less than the deductible amount, will engage in theft and negligence up to that amount. Petitioners fail to take cognizance of the fact that the deductible will apply only at the request of shippers, not carriers. Of the thousands of packages a carrier handles each day, it will be impossible for those handling the packages to determine which are moving under a tariff with a deductible provision and which are moving under a full liability tariff.[10] The investment to develop a system sophisticated enough to enable carriers to limit the amount of thefts and negligence to the amount of the deductible would be inordinate.

The implausibility of such an occurrence aside, the reality of the market place also serves to protect shippers from such claims. Very few shippers, especially in today's regulated and highly competitive transportation industry, would continue to utilize a carrier which has a high loss and damage record.

Just as unreasonable is petitioners' argument, rejected by the court of appeals, that deductibles would totally eliminate carrier liability. A deductible only eliminates carrier liability where the amount of loss or damage was trivial in nature and thus below the deductible amount.

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[10] With respect to houshold goods, the focus of Judge Pratts' dissenting opinion, SNFCC v. ICC, supra at 752, a shipper must first request that his household goods move pursuant to a deductible tariff. The remaining issue is again one of reasonableness under the circumstances. Congress has addressed this concern by requiring prior Commission approval before a deductible can even be offered by a household goods carrier.

Petitioners argue that "widespread use of $100 deductible provisions by the motor carrier industry would . . ., [bring] about a virtually complete transfer of the risk of loss in transit from carriers to shippers," Pet. at 25. There are several weaknesses in this argument. First, it assumes a specific level of rates—$100 deductible—will be adopted by the industry as a whole. For the reasons stated above, a uniform deductible is highly unlikely to occur. If a carrier does decide to publish a deductible provision in one or more of its tariffs, the rate will be tailored to the carriers operations. The deductible, if any, would be based on 1) the value of the goods transported; 2) the claims' experience of the carrier with respect to those goods; 3) acceptance of the deductible by shippers; and 4) competitive response. Another weakness of petitioners' argument is that the statistics relied on are from 13 to 16 years old, taken from an ICC decision, *Loss and Damage Claims*, 340 ICC 515 (1973), served 12 years ago.[11]

Finally, the burden of liability will shift only if the shipper, who must agree to a released rate before it can be applied to an individual shipment,[12] wishes to accept the liability and either insure itself or obtain insurance from another source. Thus, petitioners' concerns about shifting the liability are highly misleading. As we previously discussed, it was Congress' intent in the 1980

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[11] Many of the statistics in the 1972 decision date from 1969. There are no statistics in the record of this proceeding which indicate the current average claim for loss of damage. However, as further evidence of how meaningless petitioners' statistics are, if the level of claims has grown at a rate equal to the Consumer Price Index since 1969, a 1969 claim for $100 would be for $275 in December 1983.

[12] A bill of lading must be properly noted before a released rate can be applied, thus avoiding inadvertent application of the liability limitation.

legislation regarding section 10730 to "foster more competitors in the pricing of transportation service." 1980 U.S. Code. Cong. & Ad. News at 2308. "It was envisioned that the availability of a variety of released rates would enhance price competition and reduce the rates a shipper would pay (footnote omitted). The variety was likened to greater and lesser amount of insurance coverage, with the shipper to have the option to forego coverage entirely, as it might wish to do for property of low value, in order to obtain a lower freight rate." *SNFCC* v. *ICC*, *supra* at 749.

The gist of petitioners' complaint is that publication of a deductible will deprive a shipper of low value goods of any recovery for its loss or damage. While the universal validity of this statement is questionable, even if this were the unavoidable result, it appears to be one of the variety of price options which Congress sought to allow in the Motor Carrier Act of 1980.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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